

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

**JERRY M. FOCKEN and MARGARET
A. FOCKEN, Guardians and
Conservators of Corey D. Focken,**

Plaintiffs,

v.

**FORTIS INSURANCE COMPANY, now
known as TIME INSURANCE
COMPANY,**

Defendant.

CASE NO. 8:07CV280

**MEMORANDUM
AND ORDER**

This matter is before the Court on the Defendant's Statement of Appeal of Magistrate Judge's Order Regarding Jury Trial (Filing No. 38). Defendant is appealing Magistrate Judge Gossett's order of April 29, 2008 (Filing No. 34), granting the Plaintiffs' request for a jury trial in this action (Filing No. 29).

On March 28, 2008, the Plaintiffs sought to have their case calendared and docketed as one to be tried by jury. Magistrate Judge Gossett construed the request as a motion for relief pursuant to Fed. R. Civ. P. 39(b) and gave the Defendant time to file a response (Filing No. 30). The Defendant opposed the motion (Filing No. 32), and Magistrate Judge Gossett issued an order granting the motion on April 29, 2008 (Filing No. 34). The Defendant filed a Statement of Appeal of Magistrate Judge's Order Regarding Jury Trial along with supporting brief on May 9, 2008 (Filing Nos. 38 & 39).

Under NECivR 72.2(a), a party may appeal a nondispositive order entered in a civil case by filing a "Statement of Appeal of Magistrate Judge's Order" within ten days after being served with the order. The party must specifically state the order or portion thereof appealed from and the basis of the appeal, and must file contemporaneously with the

statement of appeal a brief setting forth the party's arguments that the magistrate judge's order is clearly erroneous or contrary to law. Unless otherwise ordered, any opposing party may file a brief opposing the appeal within ten days of being served with the statement of appeal.

"The district judge to whom the case is assigned . . . shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a). "The district judge will not modify, set aside, or remand to the magistrate judge any nondispositive order or portion thereof unless clearly erroneous or contrary to law." NECivR 72.2(c).

Having reviewed Plaintiffs' Request That Case Be Identified as One to be Tried to Jury and Supporting Brief (Filing No. 29), Magistrate Judge Gossett's order construing Plaintiffs' request as a motion for relief pursuant to Fed. R. Civ. P. 39(b) (Filing No. 30), Defendant's brief in opposition (Filing No. 32), Magistrate Judge Gossett's order granting Plaintiffs' request for a jury trial (Filing No. 34), Defendant's Statement of Appeal of Magistrate Judge's Order (Filing No. 38), its brief in support of that appeal (Filing No. 39), and Plaintiffs' brief in opposition to the appeal (Filing No. 40), I conclude that Judge Gossett's order (Filing No. 34), granting the Plaintiffs' request for a jury trial, was neither clearly erroneous nor contrary to law. Moreover, I concur with Magistrate Judge Gossett's reasoning and his conclusion.

IT IS ORDERED:

1. The Defendant's Statement of Appeal of Magistrate Judge's Order Regarding Jury Trial (Filing No. 38) is denied; and

2. The Magistrate Judge's April 29, 2008, Memorandum and Order (Filing No. 34) is affirmed.

Dated this 16th day of June, 2008.

BY THE COURT:

s/Laurie Smith Camp
United States District Judge